Legal Update Article

Winds of Change at NLRB: Employer Guide for Upcoming Trump Administration

By Jonathan J. Spitz, Richard F. Vitarelli, Daniel D. Schudroff, Robert S. Seigel, David Kelly, Nicole Lancia & Lorien E. Schoenstedt

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Meet the Authors

Jonathan J. Spitz
(He/Him • Jon)
Principal
(404) 586-1835
Jonathan.Spitz@jacksonlewis.com

Richard F. Vitarelli
Principal
860-331-1553
Richard.Vitarelli@jacksonlewis.com

Takeaways:

- Immediate changes to the Board are expected post-inauguration, including the appointment of a new general counsel.
- A new general counsel likely will rescind certain GC memos, including one directing the breadth of consequential damages that regional offices should seek and another finding "stay-or-pay" provisions unlawful.
- The Board composition is expected to become majority Republican and return to employer-friendly standards and rules.

Related link:

- General Counsel Memos

Employers can expect a definite shift in the National Labor Relations Board under the new Trump Administration.

Following President Joe Biden's 2020 election, labor and employment law practitioners saw sweeping legal changes due to his immediate and unprecedented removal of Board General Counsel (GC) Peter Robb and appointment of Jennifer Abruzzo. GC Abruzzo has since issued various memoranda (GC memos) altering how regional offices analyze and process unfair labor practice (ULP) charges. These memoranda identified numerous areas of Board law that the GC wished to overturn with the help of the Democratic-majority Board and required regions to investigate ULP charges more aggressively, seek injunctive relief more frequently, and refuse to settle charges without full or expanded remedies. The Biden Administration Board has issued dozens of decisions expanding protected activity, enhancing remedies for unfair labor practices, and making it easier for employees to unionize without an election, among others.

We expect a similar paradigm shift under a new Trump Administration, with a newly appointed Republican GC determining the agenda and (eventually) a Republican-majority Board adjudicating a return to more employer-friendly precedent.

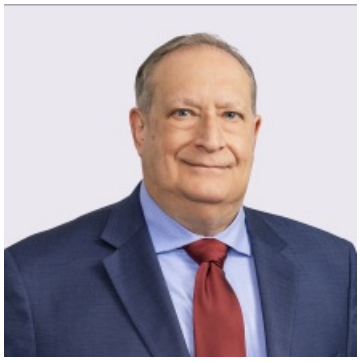
Immediate Changes

Board General Counsel

Although Biden's immediate termination of Robb was unprecedented, courts have upheld the president's authority to remove the GC on Inauguration Day. It is likely Trump will take similar measures and appoint a new GC upon being sworn into office.

Many current GC memos will be rescinded. For example, GC Memo 24-04 discusses the

Daniel D. Schudroff
Principal
(212) 545-4000
Daniel.Schudroff@jacksonlewis.com



Robert S. Seigel
(Rob)
Of Counsel
(314)746-4842
Robert.Seigel@jacksonlewis.com

David Kelly
Of Counsel
703-483-8322
David.Kelly@jacksonlewis.com

Nicole Lancia
Of Counsel
212-545-4031
Nicole.Lancia@jacksonlewis.com

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breadth of consequential damages that regional offices have sought and continue to seek, including:

- Loss of contributions already made to a retirement fund due to failure to complete a vesting period;
- Lost anticipated earnings from already-accumulated retirement fund amounts;
- Penalties imposed for early retirement fund withdrawal caused by cessation of participation;
- Unreimbursed tuition payments, where that reimbursement was part of the employee's compensation package;
- Unreimbursed web development, marketing, and business insurance costs made by an employee on commission in order to increase sales of the employer's product;
- Job search costs, such as reimbursement of mileage and gas costs, car/ride service payments, job search app costs, and resume printing fees;
- Day care costs;
- Specialty tool costs;
- Late fees and/or related accrued interest on payments of rent, utilities, mortgage, tax, auto loans and credit cards; bank overdraft fees;
- Utility disconnection/reconnection fees;
- Reductions in earnings and/or penalties resulting from a dischargee dipping into savings or retirement funds to replace income lost;
- Legal representation costs in eviction proceedings; and
- Expenses resulting from a change in immigration status.

Extraordinary remedies; consequential damages

In December 2022, the Board expanded its own authority to order consequential damages in all cases in which "make whole" relief is appropriate. *Thryv, Inc.,* 372 NLRB No. 22 (Dec. 13, 2022). While traditional make-whole remedies have included backpay and lost benefits, the Board's decision changed precedent, broadening the relief available to workers. On May 24, 2024, a unanimous three-judge panel for the Fifth Circuit Court of Appeals vacated the Board's Order in that case, but it declined to rule on whether the Board had authority to issue its new consequential damages remedy. The new GC likely will not pursue these remedies. Employers should pay attention to Board decisions that order any of the extraordinary remedies contemplated in GC Memo 24-04 and prepare to petition for review of those decisions in the circuit courts.

Full remedies in settlement agreements

GC Abruzzo issued a Sept. 15, 2021, memorandum (GC Memo 21-07) instructing regions, "in negotiating settlement agreements, in addition to seeking no less than 100 percent of the backpay and benefits owed, Regions should always make sure to seek compensation for any and all damages, direct and consequential, attributable to an unfair labor practice." This memo further emphasized that it was the agency's "policy to seek nothing less than reinstatement and full backpay in all cases involving unlawful firings" and, in cases where a discharged employee did not wish to return to work, regions were to "include front pay as part of their settlement calculations."

Electronic monitoring and algorithmic management of employees

GC Abruzzo issued an Oct. 31, 2022, memorandum (GC Memo 23-02) instructing regions

to allege that employers "presumptively violated Section 8(a)(1) where the employer's surveillance and management practices, viewed as a whole, would tend to interfere with or prevent a reasonable employee from engaging in" Section 7 activity. "Surveillance and management practices," according to the GC, included security cameras, RFID badges, GPS tracking devices and cameras in vehicles, employer-issued phones, and keylogging software on company-provided computers. The GC also sought to limit the use of artificial intelligence and algorithm-based employee productivity software. Finally, the GC sought to limit the use of personality tests and scrutiny of applicants' social media accounts.

"Stay-or-pay" provisions in employment agreements

Current GC Abruzzo issued an October 2024 memorandum (GC Memo 25-01) arguing certain "stay-or-pay" provisions are unlawful under the NLRA as part of her initiative declaring certain non-competes and restrictive covenants unlawful. The memo outlines a proposed framework to determine the lawfulness of such provisions. GC Memo 25-01 calls for employers to go beyond mere rescission of the non-compete provision and directs regions to seek traditional make-whole remedies for unlawful provisions consistent with Board law. Employers have through Dec. 6, 2024, to cure any existing stay-or-pay provisions that advance a legitimate business interest. It is likely the newly appointed GC will rescind this memo and dismiss pending charge allegations raising this issue.

Other likely immediate changes:

- Return to selective use of 10(j) injunction authority only in egregious cases
- Return of non-admission clauses in settlement agreements and the end of default language
- Return to the practice of allowing employers to hold captive audience meetings to educate employees about unions

Later Changes

Board composition/Chairman

Currently, the Board has a 2-1 Democratic majority. In June 2024, Biden renominated current Board Chair Lauren McFerran (whose term expires on Dec. 16, 2024) to a third term and nominated Joseph L. Ditelberg to fill the Board's vacant Republican seat. The Senate, however, has not yet confirmed these nominations. If McFerran is confirmed for a third term, the Board will maintain a Democratic majority until at least August 2026, when Member David Prouty's term expires. This extended majority could lead to the continuation and expansion of pro-labor policies and decisions. But if the nominees are not confirmed by the Senate prior to Trump taking office, they will likely be filled by Trump appointees and the Board will return to a Republican majority.

Ordering union recognition

In one of the most significant Board decisions in decades, the Biden Board made it easier for unions to circumvent the Board's election procedures and announced a framework for when employers must recognize a union without an election. Importantly, if the employer commits an unfair labor practice that would require the election to be set aside, the Board will dismiss the petition without an election and order the employer to

recognize and bargain with the union. A Trump GC would likely cease pursuing cases under this standard and the Board can be expected to overturn this decision.

Work rules and handbook policies

A Trump Board will likely return to the more consistent, employer-friendly *Boeing* standard. Under that standard, the Board classified company rules into three categories:

1. Rules that are lawful to maintain under the National Labor Relations Act (NLRA);
2. Rules that warrant individualized scrutiny; and
3. Rules that are unlawful and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.

A return to the *Boeing* standard would provide employers more certainty and predictability regarding the legality of their rules.

Confidentiality and non-disparagement provisions

While the Biden Board has restricted certain confidentiality and non-disparagement clauses in employees' severance agreements, a Trump Board will likely return to the standard holding that severance agreements, by themselves, are not unlawful.

Independent contractor test

The Trump Board will likely return to its pre-2014 test for determining if an individual is an independent contractor. This means focusing on the extent to which the arrangement between the ostensible employer and the alleged employee provided an "entrepreneurial opportunity" to the individual, instead of the current lower standard that makes easier to establish employee status.

"Quickie election" final rule

The Biden Board recently issued a final rule returning to its "quickie election" rules that introduced tight timelines on hearing dates and elections, promoting election speed over clarity of legal issues. A Trump Board will likely once again issue a notice of proposed rulemaking seeking to return to the 2019 rules that emphasized pre-election clarity. The Board would thus have more time to receive papers, have a formal hearing, receive and review briefs, issue a thorough decision, and actually conduct an on-site secret ballot election.

Election procedures final rule

As with the "quickie election" final rule, a Trump Board will probably issue a final rule like its 2020 rule regarding union election procedures. First, the rule would modify the Board's blocking charge policy and direct that elections be held as scheduled, irrespective of whether there is a pending unfair labor practice charge. This would ensure employees have a chance to be heard and not have their vote delayed. Second, the rule will likely reestablish the Trump-era voluntary recognition policy, limiting the period in which employees and competing unions could file an election petition challenging recognition to a 45-day period following recognition.

Bargaining units

A Trump Board can be expected to reimpose a higher hurdle for unions seeking to form

"micro" units that prevents unions from "cherry picking" job classifications to organize.

Union access to property

It is probable that a Trump Board will return to its previous standard that provides more leeway for a property owner to lawfully prohibit its on-site contractors' (or licensees') off-duty employees from accessing its private property to engage in Section 7 activity under the NLRA.

Other likely changes:

- Organizing in academic settings (such as of graduate students and student-athletes)
- Restoration of contract coverage doctrine

Less Likely, But Possible, Changes

Republican policymakers have indicated a desire to change civil service classifications so that it would be easier to fire federal workers in the Senior Executive Service (SES) or federal workers who are below SES but still deemed to have a significant policymaking function. Those positions could include the agency's regional directors, the various division heads working under the general counsel, and certain other staffers.

Likely Will Not Change

Despite the change in presidential administration, several key aspects of the Board's agenda are expected to remain consistent. The expansion of the scope of protected concerted activity, which has been a significant focus, is likely to continue as it aligns with changing workforce sentiment. Similarly, the structure of the Board, such as the presidential power to remove members and administrative law judges are foundational elements that are not anticipated to undergo significant changes. Additionally, the agency's funding has historically remained flat, and this trend is expected to persist, reflecting the ongoing budgetary constraints and priorities.

Moreover, certain labor rights and regulations are expected to remain stable. Class action waivers in arbitration agreements have been a contentious issue, but the current legal status is likely to be maintained. *Weingarten* rights, which allow employees to have union representation during investigatory interviews, are also expected to remain unchanged. Continuity should also be anticipated in areas such as the use of office computers for non-work purposes, the obligation to bargain over discipline post-certification but before collective bargaining agreement negotiation, compliance-search for work for discriminatees, and the joint-employer standard. These have been deeply embedded in labor relations practices and are unlikely to see major revisions under the new Trump Administration.

Finally, it is highly likely that the Board's case processing backlogs will continue. Recent data indicates the average amount of time between filing a ULP charge with a Board region and that region disposing of the case in one form or another increased by nearly 50 percent from 2022 to 2023. The number of field employees who investigate and try ULP charges has decreased by a third in the past 10 years, and the agency is unlikely to received increased funding to hire additional agents to address its backlog.